American Bar Association
Section of Environment, Energy, and Resources

Agency Guidance and Policy In the Department of the Interior

Andrew S. Pearlstein, Administrative Law Judge
U.S. Department of the Interior
Office of Hearings and Appeals
Salt Lake City, Utah[1]

43rd Spring Conference
Salt Lake City, UT
March 20-22, 2014

Abstract

The Department of the Interior, founded in 1849, is a highly decentralized executive branch agency. Most of the Department's dozens of bureaus and offices, which operate under a wide range of statutes and regulations, have issued an extensive array of guidance and policy documents. The various forms of agency guidance issued by the Department can have a direct effect on the regulated community and interested public involved in activities on the public lands and Indian reservations, including resource extraction, livestock grazing, and recreation.

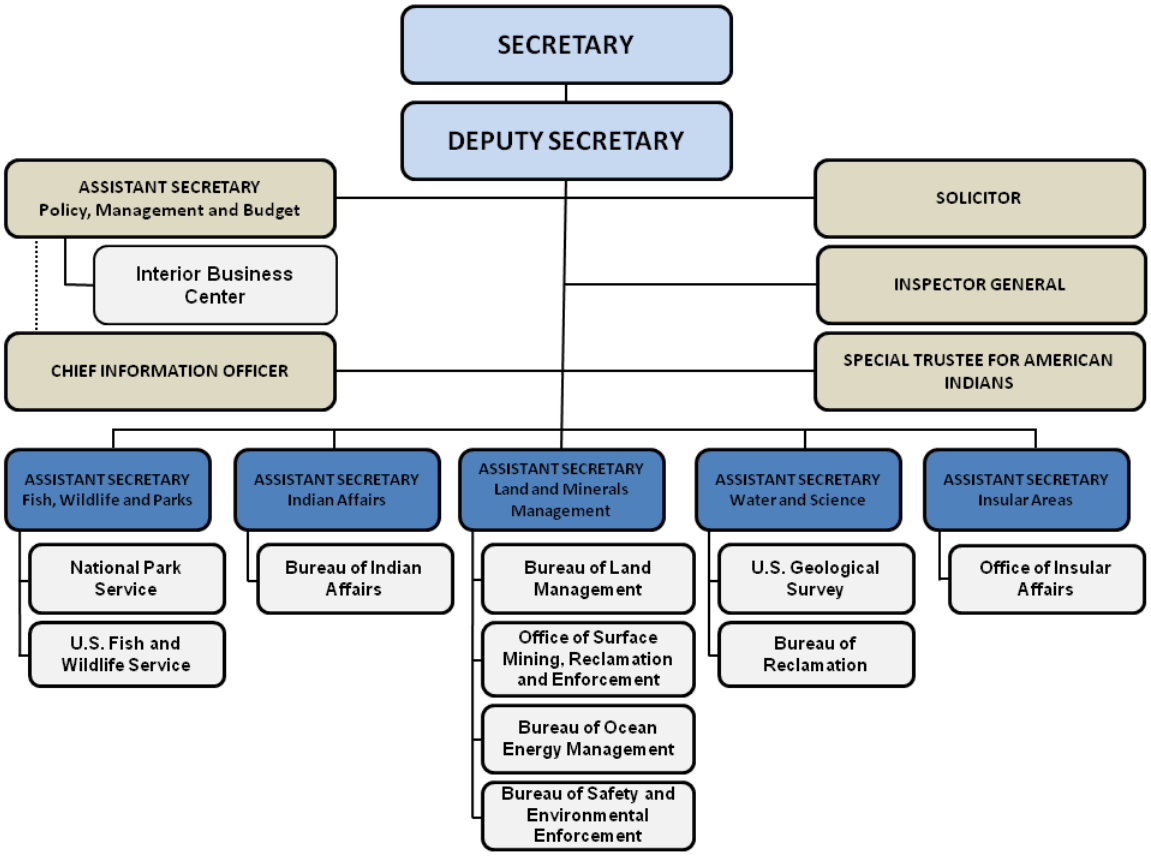
This paper will provide some background on the broader use of agency policy and guidance within the Department of the Interior, and then focus on several specific examples of how agency policy is considered in the Department's administrative litigation process, and on appeal to the federal courts. At the administrative hearing level, agency guidance documents are often admitted into evidence as exhibits, but are not binding the Office of Hearings and Appeals. Federal courts have considered Department guidance in a number of contexts. Federal court decisions generally follow the same legal principles in the consideration of Department agency guidance as that accorded EPA or other federal agency guidance, subject to a few unique quirks with limited impact.

Department of Interior Organization and Background

In 1849, Congress passed a bill creating the Department of the Interior ("DOI" or the "Department") to take charge of the Nation's internal affairs.[2] DOI originally had a

[1] The views expressed in this paper are those of the author only and do not represent those of the Department of the Interior or U.S. Government.
[2] A brief history of DOI is available at http://www.interior.gov/whoweare/history.cfm.

wide range of responsibilities, including: "the construction of the national capital's water system, the colonization of freed slaves in Haiti, exploration of western wilderness, oversight of the District of Columbia jail, regulation of territorial governments, management of hospitals and universities, management of public parks, and the basic responsibilities for Indians, public lands, patents, and pensions. In one way or another all of these had to do with the internal development of the Nation or the welfare of its people."[3] Over the years, significant additions to DOI include the establishment of: the U.S. Geological Survey (1879), the Bureau of Reclamation (1902), the Bureau of Mines (1910), the National Park Service (1916), the U.S. Fish and Wildlife Service (1940), and the Minerals Management Service (1982). The Bureau of Land Management ("BLM") was created in 1946 with the merger of the General Land Office and U.S. Grazing Service. Today, DOI employs over 70,000 people with an annual budget of about $12 billon.[4] The Department's various activities are organized into five major program divisions managed by Assistant Secretaries, in addition to other offices, as seen in the Organization Chart below.[5]



[3] *Id.*

[4] *See* http://www.interior.gov/whoweare/index.cfm.

[5] *See* http://www.interior.gov/whoweare/orgchart.cfm.

Overview of DOI Guidance and Policy Documents

The Department, like EPA and other federal agencies, has promulgated extensive volumes of regulations following the procedures in the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* ("APA"), under the authority of the various statutes that Congress has delegated to the Department. The Department's regulations occupy 17 C.F.R. volumes (eight of which are FWS listings of endangered species and critical habitats), compared to EPA's 34. As Professor Miller has noted in his paper, the various agencies within the Department face overwhelming workloads and must devise informal ways to quickly respond to numerous program management issues that are not specifically addressed in the governing statutes or regulations. Most of the major bureaus and offices within DOI have therefore promulgated their own manuals for internal use, as well as a wide array of other guidance documents. These supplement the more general procedures and policies in the Departmental Manual ("DM").[6] "Bureaus and offices must comply with the provisions of the DM, except to the extent that the provisions are superseded by appropriate authority: e.g., a change in statute, regulation, or Executive order; a Secretary=s Order or a court decision; etc."[7] The DM includes a series of chapters covering Departmental directives, organization, delegations of authority, administration, and program activities.

Each bureau has its own nomenclature for its guidance and policy documents. For example, BLM publishes its own manual, supplemented by handbooks, instruction memoranda, information bulletins, and technical memoranda.[8] BIA uses the Indian Affairs Directives System, which incorporates its manual, handbooks, regional directives, Assistant Secretary orders, and national and regional policy memoranda.[9] The Office of Surface Mining, Reclamation, and Enforcement ("OSM") publishes "significant guidance documents" and a series of directives.[10] The Bureau of Ocean Energy Management ("BOEM"), Bureau of Safety and Environmental Enforcement ("BSEE"), and Office of Natural Resources Revenue ("ONRR"), which formerly comprised MMS, issue many guidance documents, including civil penalty policies.[11]

---

[6] The Departmental Manual can be accessed at http://elips.doi.gov/elips/. ELIPS is an internet library of official policies, procedures, programs, and functions of the bureaus and offices of the Department of the Interior.

[7] 011 DM 1.2(B).

[8] http://www.blm.gov/wo/st/en/info/regulations.html

[9] http://www.bia.gov/WhatWeDo/Knowledge/Directives/index.html

[10] http://www.osmre.gov/lrg/directives.shtm

[11] http://www.onrr.gov/ReportPay/Handbooks/default.htm
http://www.boem.gov/Regulations-and-Guidance/
http://www.bsee.gov/Regulations-and-Guidance/index/

One perhaps surprising aspect of the Department's hierarchy of agency guidance is the role of formal opinions of the Solicitor, known as "M-Opinions." The Departmental Manual states that Solicitor's M-Opinions constitute "final legal interpretations . . . on all matters within the jurisdiction of the Department, which shall be binding, when signed, on all other Departmental offices and officials and which may be overruled or modified only by the Solicitor, the Deputy Secretary, or the Secretary."[12] As reinforced by an M-Opinion, Solicitor's opinions are binding on the Office of Hearings and Appeals ("OHA"), including on the Interior Board of Land Appeals ("IBLA" or the "Board").[13] M-Opinions are binding even though attorneys from the Office of the Solicitor almost always represent the Departmental agency in administrative hearings and appeals before OHA.[14]

OHA Organization and Practice Overview

The Department's OHA was created in 1970 by Secretary Walter J. Hickel to separate the adjudicatory function from the Department's other program responsibilities. OHA's procedural regulations provide the following statement of OHA's general authority:

> The Office of Hearings and Appeals, headed by a Director, is an authorized representative of the Secretary for the purpose of hearing, considering and deciding matters within the jurisdiction of the Department involving hearings, appeals, and other review functions of the Secretary. The Office may hear, consider and decide those matters as fully and finally as might the Secretary, subject to any limitations on its authority imposed by the Secretary.[15]

However, the Director of OHA and the Secretary have the power to assume jurisdiction over any case before OHA, or review any other decision by any employee of the Department, and render the final decision in the matter.[16]

In addition to the Director's office, OHA is comprised of two appeals boards -- the Interior Board of Indian Appeals ("IBIA") and the Interior Board of Land Appeals

---

[12] 209 DM 3.2(A)(11). Solicitor's Opinions can be found on the internet at http://www.oha.doi.gov:8080/isysadvsearch.html and at http://www.doi.gov/solicitor/opinions.html.

[13] Solicitor's Opinion M-37008, *Binding Nature of Solicitor's Opinions on the Office of Hearings and Appeals* (2001); 212 DM 13.8(C); *United States v. Rannells*, 175 IBLA 363, 377 n.14 (2008).

[14] In a few cases, attorneys from another executive agency may represent that agency and a Departmental agency under an interagency agreement. This occurs, for example in mining contests involving claims within National Forests, where Department of Agriculture attorneys may appear to represent the Forest Service as well as BLM.

[15] 43 C.F.R. § 4.1.

[16] 43 C.F.R. § 4.5.

("IBLA"), and three hearings divisions. The Departmental Cases Hearings Division ("DCHD" or "Hearings Division"), based in Salt Lake City, conducts all formal administrative hearings within the jurisdiction of the Department under various statutes and the APA, as well as other miscellaneous assigned informal hearings. There are currently four Administrative Law Judges ("ALJs"), with supporting attorneys and staff, in the Hearings Division. Some of the main statutes that require an APA "on the record" hearing (or that have been construed to require an equivalent hearing to achieve due process of law), that give rise to DCHD hearings are the following: the Taylor Grazing Act ("TGA");[17] the General Mining Law of 1872;[18] the Surface Mining Control and Reclamation Act ("SMCRA");[19] the Federal Oil and Gas Royalty Management Act;[20] the Indian Self-Determination and Education Assistance Act;[21] the Archaeological Resources Protection Act;[22] and the Endangered Species Act ("ESA").[23] In addition to these statutes, many cases, particularly grazing appeals under the TGA, require OHA to review BLM's compliance with the National Environmental Policy Act ("NEPA"),[24] and the Federal Land Policy and Management Act ("FLPMA").[25]

Hearings before DCHD are not governed by a single set of uniform procedural regulations. The rules governing some types of hearings are found in 43 C.F.R. Part 4, while others are found in the various regulations implementing each statute. Only the rules governing SMCRA hearings provide detailed and comprehensive guidance for all phases of the proceeding, including discovery, motions, and various timelines.[26] The Department has however promulgated substantive rules published in the C.F.R., following APA notice-and-comment procedures, implementing the TGA, Mining Law, SMCRA, and other statutes that come before OHA.[27] DCHD decisions by ALJs bind only the parties and are therefore not considered precedential. Most ALJ decisions are appealable to the IBLA, whose decisions do provide binding precedent for the Hearings Division.[28] All IBLA decisions and some Hearings Division decisions are available and

[17] 43 U.S.C. § 315 *et seq.*
[18] 30 U.S.C. § 21 *et seq.*
[19] 30 U.S.C. § 1201 *et seq.*
[20] 30 U.S.C. § 1719 *et seq.*
[21] 25 U.S.C. § 450 *et seq.*
[22] 16 U.S.C. § 470aa *et seq.*
[23] 16 U.S.C. § 1531 *et seq.*
[24] 42 U.S.C. § 4332 *et seq.*
[25] 43 U.S.C. § 1701 *et seq.*
[26] 43 C.F.R. § 4.1100 *et seq.*
[27] *See, e.g.*, 43 C.F.R. Part 4100, Grazing Administration; and 43 C.F.R. Part 3800 *et seq.*, Mining Claims under the General Mining Laws.
[28] *United States v. Energy Resources Technology Land, Inc.*, 74 IBLA 117, 130 (1983).

searchable on the OHA website.[29] For a comprehensive review of practice before DCHD, please refer to the footnoted article by my colleague, ALJ Robert G. Holt.[30]

Consideration of DOI Agency Guidance Documents in Administrative Litigation

In his paper, Professor Miller examines the distinctions between agency guidance and regulation, with particular reference to the EPA. Although perhaps not as familiar to much of the environmental bar, the same principles apply to guidance documents issued by the agencies of DOI. The IBLA has ruled that in general such guidance documents, for example BLM manuals and instruction memoranda, are not promulgated with the APA's procedural protections provided for regulations and therefore "do not have full force and effect of law and are not binding on either this Board or the public at large."[31] On the other hand, "[w]here BLM adopts agency-wide procedures that are reasonable and consistent with the law, the Board will generally uphold their application.[32] BLM employees are, however, obliged to follow the terms and instructions of their manuals.[33] As noted above, by contrast, OHA, including the IBLA, must follow Solicitor's M-Opinions.[34]

The starting point for consideration of legal issues arising before OHA are of course the statutes passed by Congress delegating authority to DOI - and then Department's regulations implementing those statutes promulgated in accord with the APA's § 553 notice-and-comment procedures. The parties in proceedings before DCHD often offer agency guidance documents into evidence as exhibits at hearing or attach them to motions for summary judgment. In general, we ALJs will receive agency guidance documents into evidence routinely, usually without objection by any party. In general, the parties understand that agency guidance does not have the force and effect of law, although it can bind BLM employees. At the Hearings Division level, we essentially accord agency guidance *Skidmore* deference – the deference to which the persuasiveness of the interpretation is due. *Skidmore v. Swift & Co.*, 323 U.S. 343 (1934).

This section will discuss several examples of OHA's consideration of agency regulations, guidance, and policy, in administrative proceedings before the Hearings

---

[29] http://www.oha.doi.gov:8080/index.html

[30] Robert G. Holt, *Practice Before the Departmental Cases Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior*, in Rocky Mountain Mineral Law Foundation Journal (Vol. 47, No. 2, 2010).

[31] *Robert S. Glenn and DeLloyd Cazier*, 124 IBLA 104, 109 (1992), quoting *Pamela S. Crocker-Davis*, 94 IBLA 328, 332 (1986).

[32] *Jesse H. Knight, et al.*, 155 IBLA 104, 122 (2001)

[33] *Id.*

[34] Solicitor's Opinion M-37008, *Binding Nature of Solicitor's Opinions on the Office of Hearings and Appeals* (2001); 212 DM 13.8(C); *United States v. Rannells*, 175 IBLA 363, 377 n.14 (2008).

Division and IBLA in three of our main practice areas: livestock grazing; mining contests; and SMCRA enforcement.

Livestock Grazing – Failure to Distinguish Guidance from a Binding Rule

The IBLA has recognized and applied the distinction between general statements of agency policy and directives that, as a practical matter, have a binding precedential effect. As noted by Professor Miller, sometimes agency officials forget the difference between guidance and regulations, and treat guidance as if it were a binding rule. This is what happened in *Fallini v. BLM*, 162 IBLA 10 (2004). BLM issued an Instruction Memorandum ("IM") that required the field offices to consider approving applications for water developments in wild horse management areas ("HMAs") through cooperative agreements only, although the TGA and regulation in effect at the time allowed such applications to be approved either through a cooperative agreement with BLM, or through a regular range improvement permit. BLM denied the Fallinis' application for a range improvement permit since the permittee did not want to construct a well that, under a cooperative agreement, would allocate half the water rights to BLM, which BLM intended to use to provide water for wild horses.

The IBLA reversed the ALJ's decision which had essentially upheld BLM's position that, under the IM, BLM had no discretion to grant the Fallinis' application for a permit. The Board noted that the IM effectively established a binding precedent on the regulated public – a function that should only properly be accomplished through the notice-and-comment procedures of the APA. The Board cited the following federal appeals court formulation of the principle, among others. "When a federal agency issues a directive concerning the future exercise of its discretionary power, for purposes of APA section [5 U.S.C. §] 553, its directive will either constitute a substantive rule, for which notice-and-comment procedures are required, or a general statement of policy, for which they are not." *Baharona-Gomez v. Reno,* 167 F.3d 1228, 1235 (9th Cir. 19990, *citing Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987). 162 IBLA 10, 37.

BLM contended it did not have to offer any factual evidence since, as a legal matter, it had no discretion to consider the Fallinis' application for a range improvement permit. However, the IBLA cited the following appellate decision language to illustrate the fallacy of BLM's position.

> When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. * * * An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.

Pacific Gas & Electric Co. v. Federal Power Commission, 506 F.2d 33, 38-39 (D.C. Cir. 1974). *Fallini*, 162 IBLA 10 at 37-38. The Board remanded the proceeding to BLM to reconsider the Fallinis' application under the normal appropriate technical standards for considering an application for a permit for a water development, based on supporting factual evidence, without reference to the IM.

Livestock Grazing – Agency Guidance Directing Non-Compliance with Regulations

Livestock grazing represents the most widespread use of public lands in the United States. BLM and the Forest Service allow grazing on over 230 million acres, about 62% of the land under their jurisdiction. BLM authorizes over 12 million animal-unit-months ("AUMs") of grazing on about 137 million acres of public land, over 75% of the land under its jurisdiction in the 11 western states.[35]

BLM has promulgated implementing regulations under the TGA, FLPMA, and other grazing and public land-related statutes to fill in the interstices of those laws, found primarily in 43 C.F.R. Part 4100. In 1995 BLM promulgated a new set of revisions to the grazing regulations that, among other things, added 43 C.F.R. Subpart 4180, entitled "Fundamentals of Rangeland Health and Standards and Guidelines for Grazing Administration," a new set of ecological mandates for grazing the public lands. The Supreme Court, in *Public Lands Council v. Babbitt*, 529 U.S. 728 (2000), upheld the new regulations in the face of a challenge by organizations of public land ranchers.

In 2006, BLM undertook another significant revision of the grazing regulations. The 18 amendments altered key parts of the 1995 regulations by limiting the participation of the "interested public" (i.e., environmental organizations) in BLM grazing decisions; granting ranchers greater ownership rights in range improvements; and weakening BLM's powers to enforce compliance with the fundamentals of rangeland health. Environmental groups challenged the 2006 rules and won a permanent injunction enjoining enforcement of those regulations. *Western Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302 (D. Idaho 2008), *aff'd in relevant part* 632 F.3d 472 (9th Cir. 2011), *cert. denied* 132 S.Ct. 366 (2011). The 9th Circuit affirmed the district court's main holdings that BLM had violated NEPA and the ESA in promulgating the new rules, and continued the permanent injunction in effect.

[35] *Livestock Grazing – Federal Expenditures and Receipts Vary, Depending on the Agency and Purpose of the Fee Charged*, General Accounting Office Report (GAO-05-869, 2005). An AUM is the unit BLM uses to allocate grazing use, based on the authorization to graze one cow with calf on public land for one month. BLM estimates that an average cow with calf will consume about 800 pounds of forage per month. Actual grazing use is always somewhat less, and often substantially less, than authorized use, due to economic considerations and environmental conditions such as drought.

Due to this injunction, the 2006 revised rules have been permanently enjoined in their entirety, although they remain in published editions of the C.F.R. and on the e-CFR website to this day. BLM itself has issued an Instruction Memorandum, IM 2009-109, directing its western field offices not to implement any of the 2006 revisions, and to only use the Part 4100 grazing regulations in effect prior to July 12, 2006. Thus BLM has been placed in the somewhat anomalous posture of issuing a guidance document directing its own offices not to implement promulgated and published regulations. Practitioners should be aware of this and only use the 2005 edition of 43 C.F.R. for any reference to the Part 4100 grazing regulations. In our administrative hearings on grazing appeals, we ALJs therefore also only cite and apply the 2005 version of the Part 4100 grazing regulations.

In grazing appeals before the Hearings Division, the parties frequently raise the issue of whether a BLM decision to authorize grazing on a particular allotment incorporates adequate terms and conditions to satisfy the requirement to take appropriate action by the start of the next grazing year to make progress towards meeting the standards for rangeland health, as required by the pre-2006 rules now in effect. This requirement has spawned BLM's issuance of numerous amendments to its handbook, instruction memoranda, and technical memoranda, on all aspects of the subject of monitoring rangeland health and managing grazing with respect to riparian areas, upland vegetation, stream bank stability, erosion, sage-grouse, various grazing management systems, and other wildlife habitat.

These guidance documents, in their length and quantity, provide some indication of the vast range of programs BLM is responsible for managing with limited resources. Livestock grazing is just one of BLM's programs. It must also manage programs on its public lands for mining, special status wildlife species, oil and gas leasing, recreation, historic and cultural resources, wild horses, off-road vehicles, as well as requirements for comprehensive regional land-use planning.

At the hearing level, the parties, including BLM, will often offer these BLM guidance documents, as well as monitoring reports derived from them, into evidence as exhibits for their own purposes. Typically, environmental groups as well as ranchers will point out that BLM has not complied with its own directives to some degree. BLM will generally respond that it has done the best it can with limited resources. As ALJs, we can only then find the facts and apply the law based on the evidence presented, which may be less than definitive.

Mineral Commodity Pricing and Validity Dates

One example of a DOI or BLM policy that has not been given much deference by OHA is the "Mineral Pricing Policy" issued by the Assistant Secretary for Land and

Minerals Management, published in the Federal Register in 2000.[36] The Mineral Pricing Policy prescribed a method for determining the commodity price of the target mineral (most often gold) on a given date for use in mining contests under the Mining Law of 1872, in which BLM is seeking a declaration that a mining claimant has not demonstrated a valid discovery of a valuable mineral, and that the claim or claims are therefore null and void. The Policy required BLM mineral examiners to derive the commodity price by averaging the average monthly prices for the previous 36 months, and the futures market prices for the ensuing 36 months.

The example is also of interest for the IBLA's explication of the sometimes inscrutable lines of authority and delegation as set forth in the Departmental Manual. The Board, in *U.S. v. Anthony*, 180 IBLA 308 (2011), noted that although BLM published the Mineral Pricing Policy in the Federal Register and solicited comments, BLM did not acknowledge receipt of any comments and simply made the Policy effective on the published date. Since issuance of the Mineral Pricing Policy did not follow APA notice-and-comment procedures, the Board stated it is "a general statement of policy under 5 U.S.C. § 553(b)(3)(A), not a substantive rule under the APA, and does not have the force and effect of law." 180 IBLA at 343.

BLM, however, argued at hearing that the Mineral Pricing Policy, in contrast to BLM directives published in the BLM Manual or as Instruction Memoranda, was issued at the Assistant Secretary level, and was therefore an exercise of the Secretary's delegated authority and binding on all bureaus and offices in the Department. BLM cited the DM for the proposition that OHA may not "review a decision in a particular matter involving specific parties issued or approved by the Secretary, the Deputy Secretary, or an Assistant Secretary." 212 DM 13.8(B).

The Board pointed out that in issuing the Mineral Pricing Policy, the Assistant Secretary did not make a decision or adjudicate a dispute involving specific parties in a particular matter. Rather, the Policy provided a methodology intended to be used by BLM examiners in all mineral contest proceedings. This distinction is analogous to the APA's different definitions of a "rule" in 5 U.S.C. § 551(4), and an "order" in 5 U.S.C. § 551(6). The Board held that "[t]he Assistant Secretary does not have authority to issue policy statements that bind all other offices of the Department not subordinate to the Assistant Secretary, or other Departmental officers who hold delegations of authority equivalent to the Assistant Secretary's without the Department undertaking rulemaking under APA procedures." 180 IBLA at 345. In accord with this ruling, the Board upheld the ALJ's decision to disregard the Mineral Pricing Policy (and to instead simply apply the price of gold on the date of withdrawal of the land from mineral location) when the price of gold was on a sharp upward trend and the life of the mine would only be for one year.

[36] 65 Fed. Reg. 41,724 (July 6, 2000).

A related issue that arises in mining contests on patent applications is the determination of the appropriate date or dates upon which to base the ultimate decision on the validity of the claim, or marketability of the mineral commodity. This issue has been settled to some extent by the Solicitor's issuance of a binding M-Opinion, although the formulation is subject to various interpretations. Solicitor's Opinion M-36994, *Patenting of Mining Claims and Mill Sites in Wilderness Areas* (May 22, 1998), provides that "marketability should be determined as of the date the applicant submitted adequate information for the Department to verify the discovery," rather than when the applicant received the First Half Final Certificate ("FHFC") from BLM. *Id.* at 15. Issuance of the FHFC is essentially a ministerial function that confirms that the claimant has a valid title to the claim and has paid a processing fee, but usually takes place well before the claimant has submitted sufficient geological and technical information to confirm a valid discovery of a valuable mineral deposit on the claim.

As we have seen, the Solicitor's Opinion is binding on OHA, but a factual issue will often arise as to when the claimant has submitted adequate information for BLM to verify the discovery. This could be the date that BLM completes its mineral report after a field examination of the claim, or some other time, earlier or later, depending on the claimant's evidence of additional sampling, processing, or market conditions relating to the mining plan for the claim. In *United States v. Rannels*, 175 IBLA 363 (2008), the IBLA upheld an ALJ's decision to apply the Solicitor's Opinion to assess marketability as of the date of the hearing, when market conditions had recently changed.

OSM Oversight Authority over Surface Coal Mine Reclamation in Primacy States

Since SMCRA's enactment, there has been much tension among OSM, the regulatory authorities in "primacy" states, and the coal mining industry, over the proper extent of OSM's oversight authority under SMCRA. This controversy has centered on a rule that authorizes OSM to issue notices of violation ("NOV") to mine operators, that could require costly additional reclamation work, upon a finding that the state regulatory authority failed to take appropriate corrective action or show good cause for not having done so, after receiving a "10-day notice" of the alleged violation from OSM. 30 C.F.R. § 843.12(a)(2). An NOV issued under this rule could cause mine operators to be caught between conflicting reclamation requirements of the state regulatory authority and OSM. The rule was ultimately upheld upon a challenge by coal industry associations that it was inconsistent with SMCRA. *National Mining Assoc. v. U.S. Dept. of the Interior*, 70 F.3d 1345 (1995).

This issue has arisen in several cases before OHA in which OSM has issued NOVs to surface coal mine operators charging violations of SMCRA's requirement that reclamation achieve "approximate original contour" ("AOC") of the mined land. The parties in these hearings have each offered OSM Directives into evidence. OSM

Directive INE-26, dated May 26, 1987, on AOC, provides that OSM should give "considerable deference" to reclamation approved by the State authority, even though an OSM inspector may have a different opinion. "AOC determinations must necessarily retain a certain amount of subjectivity and often rely principally on the judgment of the regulatory authority, which has been given the primary responsibility for such decisions under the Act." INE-26 at 1. This directive also points out that requiring re-grading and re-vegetating an already reclaimed area may frustrate environmental goals due the additional siltation and erosion that would ensue. INE-26, as might be expected, is cited favorably by mining companies and the State regulatory authorities involved in these proceedings.

A later OSM Directive, INE-35, issued on January 31, 2011, is entitled "Ten-Day Notices." INE-35 does not supersede or explicitly refer to INE-26, but it takes a distinctly different tone. This directive outlines the entire procedure under SMCRA and the implementing regulations that authorize OSM to issue a 10-day notice to a State regulatory authority when an OSM inspector has reason to believe there is a violation of any SMCRA requirement. There is no language in INE-35 indicating the State's response should be accorded any deference. Rather, if OSM determines the State authority has not taken appropriate action to correct the violation or has not shown good cause for not having done so, OSM must determine the State's response arbitrary, capricious, or an abuse of discretion, and then re-inspect the mine and issue a notice of violation. INE-35 is often cited favorably by OSM in SMCRA enforcement proceedings.

These OSM directives seem to me however to constitute appropriate use of policy guidance. They do not impose any binding duty on OSM or the regulated public. Although they may have different emphases, both directives give OSM inspectors discretion whether or not to take enforcement action, depending on the particular facts and circumstances. Regardless of the OSM directives, our decision as ALJs will be based on those facts and evidence adduced at hearing.

Consideration of DOI Guidance and Policy Documents in Federal Courts

This section will survey several federal court decisions that illustrate the consideration of DOI guidance and policy documents in Federal Courts, although they may not have involved administrative hearings. Depending on the particular statutory and regulatory scheme, officials in the Department's various agencies may be authorized to make decisions that are not subject to review internally by OHA at all, while others may be appealable directly to the IBLA without a hearing.

The interplay among Departmental rules, agency policy, and Solicitor's opinions is well illustrated in a recent 9th Circuit court decision, *McMaster v. United States.*[37] The

[37] 2013 WL 5312561 (C.A. 9, Cal.), ___ F.3d ____.

Court ultimately accorded *Skidmore* deference to a Solicitor's Opinion that altered BLM's previous interpretation of "valid existing rights" for claimants to obtain fee simple patents to claims located in wilderness areas. The Court first determined that the statutory and regulatory definition of "valid existing rights" was ambiguous, but that the Solicitor's Opinion was not entitled to *Chevron*[38] deference since it was not promulgated through formal notice-and-comment rulemaking procedures.[39] In holding that, under the Opinion, the claimant is only entitled to a patent to the mineral deposit and not the surface estate, the Court analyzed the persuasiveness of the Solicitor's Opinion in light of its consistency with the purposes and history of the Mining Law and Wilderness Act. Interestingly, the Court observed that "it seems to be somewhat of an anomaly that we have concluded that IBLA opinions are entitled to *Chevron* deference, *see Brandt-Erichsen v. U.S. Dept. of Interior, Bureau of Land Mgmt.*, 999 F.2d 1376, 1381 (9th Cir. 1993), but Solicitor's Opinions, which are binding on the IBLA and can overrule IBLA decisions are not, *see* 43 C.F.R. 4.5(a)." *McMaster* at 9, n.4.

In *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732 (8th Cir. 2001), the Court gave no deference to an informal opinion of the Associate Solicitor for Indian Affairs that the government held title to the lakebed of Devil's Lake in trust for the Tribe. The Eighth Circuit distinguished the Associate Solicitor's opinion from a formal M-opinion of the Solicitor, and held that it did not represent the position of the Department for the purposes of applying the statute of limitations to the Tribe's complaint under the Quiet Title Act.

In *Swanson Group Mfg. LLC v. Salazar*, 951 F.Supp.2d 75 (D.C. 2013), the Court considered a policy or methodology developed by an interagency team (consisting of FWS, BLM, and the Forest Service) to project spotted owl populations for use in calculating the incidental take of spotted owls in timber sales. The Court determined that this "owl estimation methodology" was applied as a binding legislative rule, and therefore held it unlawful and prohibited its use until the agencies properly adopted it following APA notice-and-comment procedures.

In *River Runners for Wilderness v. Martin*, 574 F.3d 723 (9th Cir. 2009), the 9th Circuit considered the whether the National Park Service's 2001 Park Service Management Policies (the "2001 Policies") should be accorded the force and effect of law. The plaintiffs alleged that the Park Service's 2006 Colorado River Management Plan's ("CRMP") authorization of motorized raft trips in Grand Canyon National Park contravened the 2001 Policies. The 9th Circuit adopted the District Court's opinion which held that the 2001 Policies did not have the force and effect of law since they (1) prescribed interpretive rules and statements of agency policy, but did not prescribe

[38] *Chevron, U.S.A. v. NRDC,* 467 U.S. 837 (1984).

[39] *U.S. v. Mead Corp,* 533 U.S. 218 (2001). The Supreme Court in *Mead*, however left open the possibility that some "relatively formal administrative procedure" other than APA notice-and-comment could comprise a valid rulemaking entitled to *Chevron* deference. 533 U.S. at 230.

substantive rules; and (2), the Policies were not formally promulgated under the APA or other specific statutory grant of authority. The Court cited this two-part test derived from *United States v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131 (9th Cir. 1982). The Court therefore upheld the CRMP's authorization of continued motorized raft trips in the Grand Canyon, although the 2001 Policies emphasized protecting wilderness values in areas such as the Canyon that the Park Service had designated potential wilderness.

The Court in *River Runners*, however, noted at least some potential conflict with the holding of another District Court with respect to the binding effect of the 2001 Policies. In *Southern Utah Wilderness Alliance v. National Park Service*, 387 F.Supp.2d 1178 (D. Utah 2005)("*SUWA")*, the Court upheld the Park Service's rule prohibiting motorized use of a jeep road in Canyonlands National Park, finding that the Park Service had properly relied on the Policies' interpretation of the National Park Service Organic Act's "no-impairment" mandate.[40] The Utah District Court determined that the 2001 Policies were entitled to *Chevron* analysis, when the Organic Act's "no-impairment" mandate was inherently ambiguous; the Policies were adopted through a relatively formal notice and comment process, although not pursuant to the APA; and the Policies were effectively substantive rules rather than statements of general agency policy. The *SUWA* court then held that the 2001 Policies and final rule banning motorized use in Canyonlands constituted a permissible interpretation of the Organic Act.

The Court in *River Runners* attempted to distinguish *SUWA* on the basis that the 2001 Policies were used in *SUWA* as a shield for the agency's decision, while in *River Runners* the plaintiffs sought to use the Policies as a sword to reverse the Park Service decision. 574 F.3d at 734. This raises the issue of whether agency guidance should be considered differently or accorded different levels of deference depending on whether it is used as a shield to defend agency action or a sword to oppose agency action.

In *Oregon Natural Desert Ass'n. v. BLM*, 2011 WL 5830435 (D. Ore. 2011) the Court considered, among other issues, the effect of a BLM policy document entitled *Interim Management Policy for Lands Under Wilderness Review* ("IMP"). The IBLA had upheld BLM's interpretation of the IMP, which BLM had incorporated into its Steens Mountain Regional Management Plan ("RMP"). As a major component of the RMP, BLM proposed a number of actions to control juniper expansion on Steens Mountain. The Court noted that BLM had rendered the IMP binding on itself by incorporating it into the RMP, and "any failure of the BLM to comply with its own agency guidance could be considered arbitrary and capricious." The Court cited *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 664 (9th Cir. 2009) for the proposition that "where an otherwise advisory document has been clearly incorporated into a Forest Plan or other binding document, its requirements become mandatory." The Court gave the IBLA's interpretation of the IMP

[40] 16 U.S.C. § 1 provides that the Park Service "shall promote and regulate the use of . . . national parks . . . in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

Auer[41] deference -- accorded substantial or controlling weight unless it is plainly erroneous or inconsistent with the regulation. Ultimately the Court determined that one of the IBLA's rulings was inconsistent with the IMP's restrictions on vegetation manipulations in wilderness study areas and found that this aspect of the project violated FLPMA. This case may have application in grazing appeals where the parties often argue that BLM failed to follow its own guidance documents for assessing rangeland health and managing grazing.

Conclusion – Practical Implications

The same basic principles apply to the consideration of Department of the Interior policy and guidance documents as apply to EPA and other federal agencies. They do not have the force and effect of law, although they may be accorded deference by administrative tribunals and the courts. At the administrative hearing level, the agency must produce evidence supporting application of policy documents to the facts of the case. If a DOI agency incorporates a policy document into a binding land use plan, its requirements become mandatory. Practitioners with matters before the Department should be aware that Solicitor's M-Opinions are binding on OHA and on all affected agencies within DOI. If involved in a grazing matter, practitioners should be aware that the current published grazing regulations in 43 C.F.R. Part 4100 have been enjoined and are not in effect. Instead, use the 2005 edition of the C.F.R. The decentralized nature of the Department and diverse missions of its numerous agencies make it difficult to formulate general practical implications concerning the use of agency guidance. Such guidance is however lurking everywhere throughout the Department, and attorneys should be aware that it is likely to appear in one context or another in virtually any matter within the jurisdiction of one of its agencies.

[41] *Auer v. Robbins*, 519 U.S. 452 (1997)